

STATE OF MICHIGAN
COURT OF APPEALS

MARILYNNE RICHARDSON,

Plaintiff-Appellant,

v

TAMMY SCHOONOVER and LYLE
SCHOONOVER,

Defendants-Appellees.

UNPUBLISHED
December 17, 2013

No. 311240
Wayne Circuit Court
LC No. 09-031957-NI

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order of dismissal for failure to comply with a court order. We affirm.

I. FACTUAL BACKGROUND

Plaintiff filed a complaint on December 30, 2009, alleging that defendants' vehicle hit the motorcycle on which she was a passenger and caused her severe injuries. In June of 2011, defendants filed several motions requesting, *inter alia*, the court to compel plaintiff's answers to interrogatories, plaintiff to produce requested documents and authorize access to her medical records, and plaintiff's deposition. Defendants asserted that plaintiff's deposition was scheduled three times but she failed to appear on all occasions. In response, plaintiff alleged that discovery related to the automobile accident was provided to defendants in the related no-fault benefits case previously adjudicated between the parties. The trial court ordered plaintiff to appear for the deposition and to respond to defendants' discovery requests.

Defendants also filed a motion to dismiss the case for plaintiff's failure to file the witness list that was due on March 17, 2011. Plaintiff again responded that defendants were aware of all parties and witnesses involved because of the prior litigation. The trial court denied defendants' motion to dismiss. On May 23, 2012, the trial court entered a trial notice and final pretrial order, requiring plaintiff's counsel to convene a conference with all parties and formulate a concise final pretrial order that listed the witnesses to be called. The court ordered both parties to submit to each other all documentary evidence and to mark exhibits in advance of trial.

On June 4, 2012, the first day of trial, the court advised the parties that a records custodian contacted the court regarding a subpoena *duces tecum* she received that day from

plaintiff. The records custodian indicated that she would be unable to locate the records that day. Defendants eventually moved to dismiss plaintiff's complaint, contending that plaintiff's counsel failed to file a final pretrial order or identify his witnesses and exhibits. Defendants argued that their ability to prepare for trial had been severely hampered, as they would be blindsided with whatever exhibits and evidence plaintiff chose to introduce. After a lengthy discussion, the trial court granted defendants' motion to dismiss. Plaintiff now appeals.

II. DISMISSAL

A. STANDARD OF REVIEW

"A trial court's decision to dismiss an action is reviewed for an abuse of discretion." *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. ANALYSIS

Trial courts have the inherent authority to sanction parties, which includes the power to dismiss an action. *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). Further, MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." MCR 2.504(B)(1) provides that "[i]f a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." Yet, before dismissing a case, "the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995).

This Court has set forth the following list of nonexhaustive factors for trial courts to consider when fashioning an appropriate sanction: (1) whether the violation was willful or accidental; (2) a party's history of refusing to comply with court orders; (3) the prejudice to the opposing party; (4) actual notice to defendant of plaintiff's witnesses and length of time before trial that defendant received such notice; (5) whether there was a history of deliberate delay; (5) the degree of compliance with other portions of the court's orders; (6) whether there were timely attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. See *Vicencio v Ramirez*, 211 Mich App 501, 507; 536 NW2d 280 (1995), citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

The trial court in the instant matter did not abuse its discretion in dismissing the action. This case progressed slowly through the lower court and when finally nearing the date of trial, the court ordered plaintiff's counsel to convene a conference of all parties, to confer and collaborate in preparing the final pretrial order, and to prepare and submit a final pretrial order. The order also required the parties to identify their witnesses and exhibits, to submit to each other all documentary evidence in advance of trial, and to mark all exhibits in advance of trial. The order specified that an unlisted witness or exhibit could not be called or used at trial, and

that failure to comply strictly with all the terms could result in dismissal. Plaintiff failed to comply with this court order.

After careful consideration of the circumstances of the case, the trial court dismissed the case because plaintiff's counsel did not submit or prepare a final pretrial order and failed to identify any witnesses or exhibits that he intended to introduce at trial. The court noted that counsel only had to prepare a concise pretrial order and had sufficient time to do it. The court further stated that this time frame was typical for similar cases.

The trial court also recognized that plaintiff had a history of violating court orders. It noted that plaintiff failed to file a witness list as required by the scheduling order. Further, the trial court observed that harm would result from plaintiff's actions because defendants were placed in the untenable position of speculating about what evidence or witnesses plaintiff might present.¹ The trial court also noted that it was troubled that plaintiff still was conducting discovery on the date of trial. The evidence suggested that plaintiff had served a subpoena *duces tecum* on a records custodian on the day of trial, which belied plaintiff counsel's contention that defendants had all of the evidence or witnesses he planned on introducing at trial.

We find that under these circumstances, the trial court did not abuse its discretion in finding that dismissal was "just and proper." *Vicencio*, 211 Mich App at 506. Despite defendants' repeated attempts to procure information regarding what plaintiff's counsel intended to introduce at trial, he failed to produce the requested information. Plaintiff's attorney likewise failed to prepare the final pretrial order or disclose his witness list or exhibits before trial, even though the court ordered him to do so. As the trial court's ruling recognized, such behavior did not "put defendant[s] on notice" or allow them to prepare their defense. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008).

The trial court also recognized that it had previously declined to apply the harsh sanction of dismissal because sufficient prejudice had not yet resulted. *Vicencio*, 211 Mich App at 507. "Furthermore, no lesser sanctions would have served the interests of justice." *Woods*, 277 Mich App at 631. As the trial court observed, plaintiff's counsel's behavior in attempting to obtain evidence the day of trial was directly contrary to his representations that defendants knew the evidence or witnesses he intended to introduce at trial. Furthermore, while plaintiff suggests that the trial court failed to analyze the applicable factors, the court's analysis parallel the factors found in *Vicencio* and *Dean*. Accordingly, we find that the trial court did not abuse its discretion in dismissing this case.²

¹ As the trial court noted, the issue was not whether defendants received discovery but whether plaintiff's counsel disclosed what evidence or witnesses he intended to rely on or introduce at the actual trial.

² While plaintiff asserts that it would have been impossible for her to comply with various aspects of the final pretrial order, those aspects were not the reason the trial court relied on for

III. EVIDENTIARY HEARING

A. STANDARD OF REVIEW

Plaintiff also contends that the trial court abused its discretion when dismissing the case without holding an evidentiary hearing. Because plaintiff failed to request an evidentiary hearing below, this issue is unpreserved and we review for plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

B. ANALYSIS

A trial court is not obligated to conduct an evidentiary hearing when a party does not request one. See *Vittiglio v Vittiglio*, 297 Mich App 391, 400; 824 NW2d 591 (2012). In this case, plaintiff did not request an evidentiary hearing. Moreover, an evidentiary hearing was not warranted. The trial court considered the evidence and permitted the parties to present arguments on the disputed issues. After careful consideration, the trial court issued its ruling. Because the trial court had before it the requisite factual basis to make the decision, plaintiff has failed to demonstrate that any additional hearing was needed. Accordingly, we decline to find plain error affecting substantial rights.

IV. CONCLUSION

We find no errors requiring reversal in the trial court's order of dismissal. Because we find that the trial court did not abuse its discretion, remanding for further proceedings is not warranted. We affirm.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan

dismissal. Regardless of the trial court's practice in other cases, we find that the trial court did not abuse its discretion in this case.